(2)

No. 99-6615

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

Supreme Court, U.S.
FILED
OCT 1 1999
OFFICE OF THE CLERK

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Imminent Execution Scheduled
October 28, 1999

Pursuant to Rule 39 of the Rules of the Supreme Court of the United States, Michael Wayne Williams, by counsel, hereby asks leave to proceed in forma pauperis. Petitioner sought and was granted leave to proceed in forma pauperis in all prior proceedings in both state and federal courts. He had assigned counsel at every stage of his capital proceedings. Undersigned counsel was appointed pursuant to 21 U.S.C. sec. 848 in prior federal court proceedings. Mr. Williams' Affidavit in support is attached.

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51pp

Mr. Williams is currently incarcerated at Sussex I State Prison, 24414 Musselwhite Drive, Waverly, Virginia, in the custody of the Respondent.

Respectfully submitted,

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October 16, 1999

IN THE SUPREME COURT OF THE UNITED STATES

IN FORMA PAUPERIS AFFIDAVIT

I, MICHAEL WAYNE WILLIAMS, being first duly sworn according to law, depose and say that I am the petitioner in this proceeding; that in support of my motion to proceed without being required to prepay fees, costs, or security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the following relating to my ability to pay the costs in this Court are true:

1. I am presently incarcerated in Sussex I State Prison, Waverly, Virginia, and am not employed;

2. In the past six months, I have not received any income from a business, profession, or any other source, except $20.00/month from the prison; and my mom will send me a few dollars for soap and stuff

3. My cash assets are $27.45;

4. I own no stocks, bonds, automobiles, real estate, or other valuable property.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Michael Williams
MICHAEL WAYNE WILLIAMS
Inmate No. 165709

Sworn to before me this 20th day of September, 1999:

Notary Public

My commission expires on: 31 OCT 2003

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OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison,
Waverly, Virginia,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Date:
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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a prosecutor violates a criminal defendant's Sixth Amendment right to confront the witnesses against him when the prosecutor impeaches a testifying defendant based on his mere presence throughout the trial, and, if so, whether this is a new rule under Teague v. Lane, 489 U.S. 288 (1989).

2. Whether 28 U.S.C. sec. 2254(e)(2), which prohibits a federal habeas court from holding an evidentiary hearing only "if the applicant has failed to develop the factual basis of a claim in State Court proceedings," governs petitioner's claims where throughout state proceedings, the state suppressed the relevant facts, denied petitioner's discovery requests, denied all investigative and expert resources to investigate, develop, and discover claims, and denied an evidentiary hearing.

3. Whether a petitioner seeking expert assistance under revised 21 U.S.C. sec. 848(q)(9), who moves to proceed ex parte and asserts a need for confidentiality, must first demonstrate his need for confidentiality at an adversarial hearing before opposing counsel.

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PETITION FOR A WRIT OF CERTIORARI

Michael Wayne Williams, a Virginia death sentenced inmate, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the district court's denial of his petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the court of appeals is reported at Williams v. Taylor, __ F.3d __, No. 99-1 (4th Cir. 1999), and is reprinted in the Appendix (A 2). The opinion of the district court dismissing the petition is reported at 6 F. Supp.2d 545 (E.D. Va. 1998) and appears at A 9. The order of the court of appeals granting an emergency stay of an evidentiary hearing, In Re: Greene, No. 98-17 (4th Cir. 5/27/98), is unreported and appears at A 20. The initial opinion of the district court granting an evidentiary hearing on claims of juror and prosecutorial misconduct is unreported and appears at A 23. The Virginia Supreme Court's opinion on direct review is reported at Williams v. Commonwealth, 450 S.E.2d 365 (Va. 1994), and appears at A 126. The Virginia Supreme Court's order dismissing the state habeas petition appears at A 123.

JURISDICTION

The court of appeals issued its judgment and decision on August 2, 1999. Williams filed a timely petition for rehearing and suggestion for rehearing en banc. The court denied the petition on August 27, 1999. A-1. This Court has jurisdiction pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution in

pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial by an impartial jury * * * [and] to be confronted with the witnesses against him * * *."

This case also involves 28 U.S.C. sec. 2254(e)(2), reprinted at A 155, and 21 U.S.C. sec. 848(q)(9), reprinted at A 154.

STATEMENT OF THE CASE

The Crime And The Trial

On February 27, 1992, Morris Keller, Jr., and his wife, Mary Keller were shot several times in a wooded area behind their home in Cumberland County, Virginia. Their house had been robbed and burned. Based on statements from Jeffrey Cruse, who admitted raping and murdering Mrs. Keller, the police arrested petitioner, Michael Williams[1]. Cruse became a witness for the state.

Both Williams and Cruse testified at Williams' trial. Each maintained that he had fired a single shot (Williams at Mr. Keller and Cruse at Mrs. Keller) and that the other defendant had fired the remaining seven shots at the Kellers. Both Williams and Cruse agreed that Williams fired once at Mr. Keller while facing Mr. Keller. Mr. Keller fell to the ground, but then Mr. Keller stood

[1] Williams and Cruse were charged in separate indictments with the same offenses: capital murder, robbery, rape, and abduction of Mary Keller; capital murder, robbery, and abduction of Morris Keller; capital murder based on two related homicides; statutory burglary, and arson. "JA" refers to the Joint Appendix filed with the Fourth Circuit Court of Appeals.

up. JA 115-116. In view of Virginia's triggerman rule[2], the jury had to determine who killed the Kellers -- Williams or Cruse. As the state's forensic evidence did not settle this question, the verdict on three capital murder counts and two death sentences, turned on the relative credibility of Williams and Cruse.

Cruse testified first. He stated that Williams decided to commit a robbery and selected the Kellers' home. Cruse had a .357 revolver before he and Williams entered the house. Williams and Cruse forced their way into the home after asking to use the phone, and Williams dictated all their actions once inside. JA 89-91, 97, 104, 109. Searching the house, Cruse found a loaded .38 revolver and .38 bullets. During that evening, Cruse and Williams switched possession of the guns several times. When Williams told Cruse to take the Kellers into the woods, Cruse was unaware of any plan to kill the couple until moments before the first shots were fired. Cruse admitted shooting Mrs. Keller once with the .357. JA 117. Forensic experts confirmed that Mrs. Keller was shot three times in the face by two different guns. Both a .357 Ruger and a .38 Smith

[2] Under the "triggerman" rule, only the actual perpetrator of the crime (except in the case of murder for hire) may be convicted of capital murder and be eligible for execution. See Frye v. Commonwealth, 345 S.E.2d 267, 280 (Va. 1986)(victim killed by gunshot); Cheng v. Commonwealth, 393 S.E.2d 599, 607-608 (Va. 1990)(same). Where one or more persons were involved, they must have jointly participated in inflicting the fatal wounds to be liable for capital murder. Coppola v. Commonwealth, 257 S.E.2d 797, 806-807 (Va. 1979)(victim killed by beating); Strickler v. Commonwealth, 404 S.E.2d 227 (Va. 1991)(same). "One who is present, aiding and abetting the actual murder, but who does not actually fire the fatal shot, is a principal in the second degree and may be convicted of no greater offense than first degree murder." Frye at 280. See Va. Code sec. 18.2-31.

& Wesson had been used.

Cruse had been indicted on three counts of capital murder and was eligible for the death penalty if convicted. On direct and redirect, Cruse stated he had no agreement with the Commonwealth about his sentence or any benefits in exchange for his testimony. JA 152, 178. However, when the lead prosecutor asked, "Is it your understanding that the Judge[3] is going to decide whether you live or die?" Cruse responded "Correct." JA 178. On summation, the lead prosecutor argued that Cruse was credible because "[H]e sits here today facing the death penalty . . . his back is against the wall; if he lies, he dies[.]" A 153.

In exchange for Cruse's testimony against Williams, the state originally agreed not to seek the death penalty. On cross, Cruse admitted that he had given a series of false statements at the preliminary hearing. JA 172-73, 163-66. When Cruse failed to admit that he had raped Mrs. Keller, his agreement was withdrawn once forensic proof of the rape was obtained. JA 170.

Williams was the last witness to testify, and he contradicted Cruse's account. Cruse had "actively participated" in the decision to commit the robbery and had not meekly followed Williams that night. Cruse, not Williams, had suggested murdering the Kellers to eliminate them as witnesses. JA 248-49, 255-56. While Williams admitted his part in the robbery, burning the Kellers' house, and

[3] Under Virginia law, when a defendant enters a plea, the judge alone determines the sentence. At a capital trial, the jury imposes sentence, and the judge cannot impose death if the jury has not recommended a death sentence. Va. Code sec. 19.2-264.5.

firing the first, nonfatal shot at Mr. Keller, Williams denied raping Mrs. Keller.[4] JA 252-57, 269. Williams stated he had fired only one shot that night using the .38.

Williams' defense to capital murder was that the one shot he fired at Mr. Keller was not fatal. Mr. Keller had been shot twice in the right leg and three times in the head. The medical examiner testified that one of the bullets went through the facial bones and was not necessarily fatal. JA 195, 196. Williams maintained that the fatal shots to both Mr. and Mrs. Keller were fired by Cruse.

On cross-examination, the prosecutor attacked Williams' credibility by stressing that he had exercised his right to be present during the testimony of the other witnesses. The prosecutor's first two questions were, "Do you know what a Motion to Exclude Witnesses is," and "Have you been watching this trial as we've been going along here?" A 147. After establishing that Cruse and the other prosecution witnesses did not have a chance to hear the testimony of any other witness, the prosecutor then asked:

> You're the only witness who has sat in here through this trial and heard the testimony of every witness before you got to testify, isn't that correct?

A 148. When Williams' counsel objected that Williams was merely exercising his constitutional right to confront his accusers, the trial judge overruled the objection and permitted the question to stand. A 149. Near the end of his cross-examination, the

[4] Forensic tests eliminated Mr. Keller as a semen donor and determined that if there was only one donor, it was Cruse. R. 1112, 1115. If there were two donors, the results were consistent with both Williams and Cruse as donors. R. 1113. ("R." refers to the record on direct appeal.)

prosecutor asked Williams whether, "as a convicted felon who has heard all the testimony of all the witnesses in here," he had testified truthfully. A 274.

The prosecutor returned to this theme in his summation. He argued that Williams was not as credible a witness as Cruse because Williams had exercised his right under the Sixth Amendment to be present at trial and confront the witnesses against him[5]. On rebuttal, the prosecutor argued that Cruse was charged with two counts of capital murder and was facing the death penalty: "And like he told you right now, his back is against the wall; if he lies, he dies, and that is his situation." A 153 (emphasis added).

At the conclusion of the guilt phase, Williams was convicted on all counts. At the sentencing phase, the jury found both vileness and future dangerousness and sentenced Williams to death. On February 22, 1994, the trial judge imposed two death sentences.

A trial date was never set for Cruse. Two months after Williams' conviction, Cruse pled guilty to the capital murder of Mrs. Keller and to the reduced charge of first degree murder of Mr. Keller. At the sentencing hearing, the prosecutor urged the Court to spare Cruse's life based on his cooperation against Williams. Cruse received a life sentence on April 26, 1994. JA 1670.

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[5] "Williams sat right here -- and he's got a right to do it -- and he listened to everybody. Mr. Cruse didn't have that right to sit here and listen to everybody. He came in and told you as it was and it was corroborated right down the line on everything he said. You heard witnesses, honest witnesses, believable witnesses, that showed you that Mr. Cruse is believable. He's telling it like it is. And Mr. Williams had his right to sit in here and listen to everything that happened." A 151.

The Direct Appeal

On appeal to the Virginia Supreme Court, Williams argued, inter alia, that the prosecutor violated his right of confrontation by commenting upon his exercise of that right during cross-examination. The Virginia Supreme Court summarily rejected that argument. The court stated that it "fail[ed] to see how those rights are violated by a question that reflected what the jury already knew." A. 136.

The State Habeas Corpus Proceedings

Williams' appointed state habeas counsel made numerous and varied efforts to discover claims and develop evidence supporting them. He filed an extensive request for any Brady materials held by the Commonwealth. JA 376. He specifically requested all psychiatric reports of any witness that could affect the witness' credibility. JA 379. He asked to examine the investigative files of the relevant sheriff's office. JA 374-75. As Cruse was incarcerated at an unknown location out of state, habeas counsel sought disclosure of that location so he could interview Cruse. JA 389. All requests were refused. State habeas counsel then filed a motion with the Virginia Supreme Court seeking production of Cruse for an interview and production of all documentation relating to Cruse's incarceration. JA 398. State habeas counsel moved for the appointment of investigators and forensic experts to examine issues relating to the shooting and Cruse's testimony. JA 385. He also moved for the appointment of a jury investigator to examine "irregularities, improprieties and omissions" in the empaneling of

the jury. JA 386. The state vigorously opposed all motions, and the Virginia Supreme Court denied each one. A 123.

In his state habeas petition, Williams alleged that Cruse had an undisclosed understanding or agreement with the state: if he testified against Williams, the state would not seek the death penalty. Under Brady v. Maryland, 373 U.S. 83 (1963), the state was required to disclose any agreement. The state responded with an affidavit from Cruse's attorney and an affidavit from one of the two prosecutors denying that any agreement existed. However, the lead prosecutor who presented Cruse's testimony at trial and who told the jury "if he lies, he dies," never submitted an affidavit nor did Cruse. The state court dismissed the claim as "without merit," giving no factual or legal grounds for its action. JA 502.

The Federal District Court Proceedings

A. In federal habeas, Williams renewed his claim that the prosecutor violated his Sixth Amendment right of confrontation by impeaching him with his exercise of that right. He argued that this Court's decisions in Griffin v. California, 380 U.S. 609 (1965) (Fifth Amendment prohibits comment on defendant's failure to take the witness stand) and Brooks v. Tennessee, 406 U.S. 605 (1972) (requirement that defendant testify first for defense or not at all violates Fifth Amendment) prohibited impeachment based on his mere presence throughout the trial testimony and proceedings.

While expressing serious concern about the "propriety" of the prosecutor's comments, the district court held that prior decisions of this Court did not "dictate" a finding that the prosecutor

violated Williams' rights. The district court also held that such a result would violate Teague v. Lane, 489 U.S. 288 (1989). A 63. However, citing Griffin, the district court found the state court's justification for dismissing the claim "erroneous and unpersuasive." A 64.

B. Williams renewed his claim that the state had failed to disclose a sentence agreement with Cruse in violation of Brady and the Sixth Amendment. The district court found that "Cruse played a critical role in the Commonwealth's case against Williams," that without Cruse's testimony "the physical evidence could not establish who fired the fatal shots," and that "Williams' conviction [of capital murder] clearly hinged on the credibility [of Cruse]." As the state court had "provided no insight as to the manner or reason by which it made its factual or legal determinations," the district court granted Williams an evidentiary hearing on the sentence agreement claim. A 76, 77-78.

C. Williams raised a new Brady claim in federal habeas based on the state's failure to disclose a pretrial, confidential, psychiatric report on Cruse. The report stated:

> "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time." (JA 865.)

In view of Cruse's detailed trial testimony, the district court held that the undisclosed psychiatric report was Brady material. It impeached Cruse's testimony, and Williams suffered obvious prejudice from the state's failure to disclose the report. A 54. However, the district court held Williams had failed to

demonstrate cause for his failure to raise this claim in state court. A 55. Although state habeas counsel, White, had reviewed Cruse's state court file, he did not find the report therein. See White Affid., JA 1500. The Cruse report was discovered in the court files by federal habeas counsel's investigator. JA 1459-60. Given its sensitive nature, the report clearly had been improperly placed in a public file. See Va. Code sec. 53.1-40.10. Without holding a hearing to determine when the report reached the public file or to assess the credibility of key witnesses before deciding if Williams had established cause for default, the district court simply dismissed the claim.

D. Based on the facts set forth below, Williams presented two new claims in federal habeas arising from juror and prosecutorial misconduct during voir dire. He alleged violations of his Sixth Amendment right to an impartial jury and right to a fair trial.

During his federal habeas investigation, Williams learned that Bonnie Stinnett, the jury forewoman, failed to reveal that Deputy Sheriff Claude B. Meinhard, was her ex-husband and the father of her four children. Meinhard testified about his investigation of the Keller homicides and was one of the officers who interviewed Cruse. Stinnett also failed to reveal that one of the prosecutors, Woodson, had been her divorce attorney[6]. A 143, 146. Despite

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[6] The trial court asked these questions (A 143, 146):

Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?

Are any of you involved in law enforcement?

several opportunities to reveal her relationship to Meinhard and Woodson, Stinnett remained silent. In federal habeas, Stinnett submitted an affidavit stating that she had spoken to Meinhard "only one or two times a year" since the divorce in 1979. JA 1425a. As Stinnett had custody of their four, minor children and Meinhard visitation rights, this affidavit was not credible.

The prosecutor, Woodson, never elicited Stinnett's relationship to Meinhard during voir dire, never advised the court or defense counsel of that relationship, and never revealed his involvement in their divorce. In federal habeas, Woodson submitted an affidavit stating that he knew during jury selection that Stinnett was Meinhard's ex-wife, he did not bring this fact to the attention of the court or the defense, and he had represented "one or both" parties in their divorce although he denied any independent recollection of this. JA 1425c-d.

The district court held that Williams had demonstrated cause and prejudice to overcome any procedural bar to review of these claims. A 52. The district court granted an evidentiary hearing on claims of juror and prosecutorial misconduct.

E. While preparing his federal habeas petition, Williams moved ex parte under 28 U.S.C. sec. 848(q)(9) for appointment of forensic

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Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard[.]

Although the Keller murders were highly publicized in the small community where the trial occurred, Stinnett, a high school teacher, denied ever hearing or reading any news stories or reports about Williams or the case. A 145.

experts and an investigator to assist in developing his federal claims. The district court initially granted Williams' applications based on motions detailing the required services and found the services "reasonably necessary." A 121-122. This authorization was withdrawn when the state moved for an adversarial hearing on the need for confidentiality. Williams insisted that his need for confidentiality could only be demonstrated ex parte and refused to make any public disclosures. A 119-120. Williams argued that the only reasonable construction of the statute consistent with its purpose required the district court to assess the need for confidentiality ex parte while maintaining a transcript for review. The statute does not mention or require an adversarial hearing. The district court held that the need for confidentiality must be demonstrated at a hearing and revoked the grant of assistance. Williams' renewed application for services after filing his initial petition was also denied.

The Fourth Circuit's Stay And The Decision On Remand

On the state's motion, the Fourth Circuit granted an emergency stay of the evidentiary hearing on the three claims of juror and prosecutorial misconduct. The Fourth Circuit directed the district court to apply the restrictive provisions of 28 U.S.C. sec. 2254(e)(2)(A) and (B) to Williams' claims (A 21):

> [The Antiterrorism and Effective Death Penalty Act] establishes certain limits on a court's ability to conduct an evidentiary hearing where an applicant has failed to develop the factual basis of a claim in state court. In such cases, the court may hold an evidentiary hearing only if the claim satisfies two requirements. First, the claim must rely on either certain retroactive new rules of constitutional law or a "factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. sec. 2254(e)(2)(A). Second, the underlying facts must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Id. sec. 2254(e)(2)(B).

Williams argued that sec. 2254(e)(2) did not apply to his case at all because the statute's condition precedent had not been satisfied, i.e., Williams had not "failed to develop" his claims. He had made diligent efforts in state court but was denied discovery, expert resources to develop and discover claims, and a hearing. On remand, the district court agreed in part and held that Williams had tried to develop his claims in state court but had been blocked repeatedly by the state. A 16. The district court concluded, however, that "this Court has been directed . . . to apply section 2254(e)(2)[.]" The district court concluded that a hearing was prohibited and dismissed the claims. A 18-19.

The Fourth Circuit's Decision On Appeal

A. Williams raised his Sixth Amendment claim that the prosecutor improperly impeached him based on his presence throughout the trial. The Fourth Circuit did not reach the substantive issue[7]. The Court described Williams' inculpatory testimony as "devastating" and held that any error was harmless, citing Brecht v. Abrahamson, 507 U.S. 619 (1993). A 7. The Court affirmed the district court's decision that holding the prosecutor's remarks to be a Sixth Amendment violation would create a new rule. Ibid.

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[7] The Court noted the grant of certiorari on this issue in Portuondo v. Agard, 119 S. Ct. 1248 (1999) (argument set for Nov. 1, 1999),

B. Williams appealed the denial of a hearing under 2254(e)(2) on his claim alleging an undisclosed plea agreement with Cruse. In its decision the Fourth Circuit erroneously stated the district court's opinion. The Fourth Circuit held that the district court "properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's determination in view of the unrefuted evidence." A 6. The Court also held that even if Cruse had an undisclosed agreement in violation of Brady, Williams could not show materiality--a reasonable probability of a different result--given his admitted participation in the crimes. Relying on sec. 2254(d)(1) and Green v. French, 143 F.3d 865, 870 (4th Cir. 1998)[8], the Fourth Circuit held that the state court's denial of the plea agreement claim was "minimally consistent" with controlling precedent. A 6.

C. Addressing Williams' Brady claim arising from Cruse's undisclosed psychiatric report, the Fourth Circuit affirmed the district court's dismissal but on slightly different grounds. Relying on 28 U.S.C. sec. 2254(e)(2)(A)(ii), the court concluded that the discovery of Cruse's report during federal habeas in the same file that state habeas counsel had reviewed demonstrated that "[state habeas] counsel did not act diligently." A-5. The Fourth Circuit ignored Williams' repeated requests for this very information in state court and the state's failure to disclose the report. The Fourth Circuit also held that Williams could not

[8] This Court granted certiorari in Williams v. Taylor, 119 S. Ct. 1353 (1999)(argued Oct. 4, 1999), to review the Fourth Circuit's interpretation of sec. 2254(d)(1) set forth in Green.

demonstrate innocence under sec. 2254(e)(2)(B).

D. The Fourth Circuit rejected Williams' argument that sec. 2254(e)(2) did not apply to his Sixth Amendment claims arising from the jury selection. Williams' had not been diligent in developing those claims in state court. Stinnett's divorce had been a matter of public record since 1979, and federal habeas counsel located those documents. These facts demonstrated that state habeas counsel could have done so as well. Williams' general request for a jury investigator in state habeas had been insufficient to state a specific claim[9]. Therefore, the failure to develop the record must be attributed to Williams, not to the state. A 4. The Fourth Circuit also held that Williams could not demonstrate his innocence under 2254(e)(2)(B) since he had admitted shooting once at Mr. Keller. Id. A federal evidentiary hearing was prohibited.

E. The Fourth Circuit affirmed the district court's construction of 21 U.S.C. sec. 848(q)(9). A "petitioner must demonstrate his need for confidentiality at an [adversarial] hearing" before the state's counsel. The application cannot be made ex parte. A 8.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE WHETHER A PROSECUTOR VIOLATES A TESTIFYING DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES BY IMPEACHING HIM WITH HIS PRESENCE AT TRIAL AND, IF SO, WHETHER THIS CONSTITUTES A NEW RULE UNDER TEAGUE v. LANE, 489 U.S. 288 (1989)

The first issue in this case presents a conflict among the

[9] After the district court denied all investigative and expert assistance, Williams' federal habeas counsel retained an investigator to assist in federal court. State habeas counsel lacked the means to do so when the state court denied assistance.

Second Circuit Court of Appeals, the Fourth Circuit Court of Appeals, and the Virginia Supreme Court concerning the constitutionality of a prosecutor's comments on a testifying defendant's exercise of his right to confront witnesses, and whether such impeachment can be harmless where credibility is the sole issue for the jury. The Fourth Circuit also held that if such comment violates the Sixth Amendment, it constitutes a "new rule" under Teague v. Lane, 489 U.S. 288 (1989).

A. The Sixth Amendment guarantees to all state and federal criminal defendants the right to confront the prosecution's witnesses. Pointer v. Texas, 380 U.S. 400, 403 (1965). The Sixth Amendment also guarantees the defendant a right to be present at all stages of the trial. Illinois v. Allen, 397 U.S. 337, 338 (1970). Recognizing the importance of the issue presented, this Court granted the state's petition for certiorari in Portuondo v. Agard, 119 S. Ct. 1248 (1999), which posed this question:

> Whether the Second Circuit Court of Appeals erred in extending this Court's decision in Griffin v. California, 380 U.S. 609 (1965) -- which prohibited a prosecutor's comment on a defendant's right to remain silent -- to a prosecutor's comments on a testifying defendant's presence in the courtroom during the testimony of other witnesses.

The prosecutor in Agard argued that the defendant was less credible than the prosecution witnesses because he attended the entire trial while the witnesses were present only during their own testimony. This was a generic argument and was not based on the defendant's testimony concerning any particular facts. The prosecutor stated:

> You know, ladies and gentlemen, unlike all the other witnesses. . . the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> [objection overruled]
>
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
>
> [objection overruled]
>
> He's a smart man. I never said he was stupid . . . He used everything to his advantage.

Agard v. Portuondo, 117 F.3d 696, 707 (2d Cir. 1997), aff'd on rehearing, 159 F.3d 98 (2d Cir. 1998).

The Second Circuit held that the prosecutor's summation remarks violated Agard's "right to confrontation, right to testify on his own behalf, and his right to receive due process and a fair trial." Id. at 709. The prosecutor's remarks were harmful where the issue for the jury and the verdict turned on the credibility of the defendant and the victim. 117 F.3d at 714; 159 F.3d at 99.

The Second Circuit based its holding on this Court's decision in Griffin v. California, 380 U.S. 609 (1965), that addressed a prosecutor's (and then a trial judge's) comments on a defendant's refusal to testify. Noting that the defendant was present at several key events relating to the charged offense, both the prosecutor and the trial judge instructed the jury to infer that the defendant would have testified had he had any exculpatory evidence to offer. See 380 U.S. at 610-12. Although the jury was obviously aware that the defendant did not testify, this Court reversed. The prosecutor's comments, this Court found, were "a penalty imposed . . . for exercising a constitutional privilege" that "cut[] down on the privilege [against self-incrimination] by

making the assertion costly." Id. at 614.

In reaching this conclusion, the Griffin Court rejected the state's suggestion that the adverse inference the prosecutor urged the jury to draw from the defendant's refusal to testify was "natural and irresistible." Id. First, this Court found that such an inference was neither natural or irresistible: even a defendant with exculpatory evidence to give might refuse to testify out of "fear that his prior convictions will prejudice the jury." Id. at 615 (quotation omitted). Second, this Court found that even if an adverse inference were warranted, the comment by the prosecutor or the judge would be improper:

> What a jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id. at 614. Accordingly, the Court held that the comments of the prosecutor and the trial judge constituted reversible error. See id. at 615.

Citing Griffin, this Court in Brooks v. Tennessee, 406 U.S. 605 (1972), held that the state may not require the defendant to testify prior to any other defense witnesses:

> [A] defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed. Yet under the Tennessee rule, he cannot make that choice "in the unfettered exercise of his own will." Section 40-2403 exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first [footnote omitted]. This we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the stand [footnote omitted]. The rule, in other words, "cuts down on the privilege [to remain silent] by making its

assertions costly."

Id. at 610-11 (citing Griffin, 380 U.S. at 614 (1965)).

B. The combined holdings in Griffin and Brooks prohibited the impeachment conducted in petitioner's case. The prosecutor began his cross-examination of petitioner with a series of twelve questions demonstrating that petitioner had been present throughout the trial and heard the testimony of each and every witness, although the witnesses had not. A 147-148. These initial questions were generic in nature. They were not tied to any specific instance of alleged fabrication responsive to the testimony of other trial witnesses. The prosecutor sought to demonstrate that petitioner was not as credible as the prosecution's principal witness simply because petitioner had been present for and heard the testimony of each witness. JA 303-04.

As in Agard, the capital verdicts and petitioner's death sentence depended solely on the jury's assessment of the credibility of the two witnesses -- petitioner and the cooperating co-defendant, Cruse. Absent the improper comments of the prosecutor, the jury may well have concluded that Cruse, not petitioner, was responsible for the murders.

In contrast to the Second Circuit, the Virginia Supreme Court on appeal found no constitutional violation where the offending questions on cross examination only "reflected what the jury already knew." Williams v. Commonwealth, 450 S.E.2d 365, 375 (Va. 1994). A 136. The state court cited no legal authority in support of its opinion. As this very reasoning was explicitly rejected by

this Court in Griffin, the state court demonstrated an erroneous understanding of clearly established constitutional principles.

The rationale adopted by the state court is flatly inconsistent with this Court's decisions under the Fifth Amendment and merits no deference under 28 U.S.C. sec. 2254(d)(1). The state court found that the prosecutor's comments did not violate petitioner's constitutional rights because those comments "reflected what the jury already knew." This Court has never endorsed such a rationale. To the contrary, this Court has repeatedly held that, where a defendant exercises a constitutional right at trial, prosecutorial comment on the exercise of that right is impermissible. See, e.g., Anderson v. Nelson, 390 U.S. 523, 525 (1968) (per curiam)(comment on refusal to testify); Griffin v. California, supra (same); Johnson v. United States, 318 U.S. 189, 196-97 (1943) (comment on invocation of privilege against self-incrimination). A more basic constitutional principle can hardly be imagined.

As in Griffin, the prosecutor's comments in petitioner's case imposed a penalty on petitioner for exercising his right of confrontation, thereby "cutting down on the privilege by making its assertion costly." Similarly, as in Griffin, the mere fact that the jury knew the petitioner had exercised his right to confront the witnesses against him did not give the prosecutor license to "solemnize" the defendant's attendance at trial "into evidence against him." Like the defendant in Griffin, petitioner had a legitimate reason to exercise his constitutional right to confront

the witnesses against him. Indeed, virtually every criminal defendant chooses to be present at trial, and some choose to testify. Brooks made it clear that the state cannot dictate when a defendant will testify if he chooses to exercise that right. It follows that the right to testify cannot be abridged by prosecutorial comment on the timing of a defendant's testimony.

C. Recognizing the grant of certiorari in Agard, the Fourth Circuit declined to reach the merits but held that any error was harmless[10]. The Court reasoned that petitioner's inculpatory testimony was "devastating" and thus the prosecutor's remarks could not have affected the verdict, citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

The Fourth Circuit's harmless error analysis applying Brecht conflicted with that of the Second Circuit in Agard, 117 F.3d at 714-15. Where the forensic evidence could not settle the question of who fired the multiple shots that killed the Kellers, the jurors had to determine whether they believed petitioner or Cruse. If the jurors believed petitioner, then the guilt phase verdict would have been affected[11] and very likely the sentencing phase as well.

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[10] The Fourth Circuit noted that state court decisions on the merits of a claim are reviewed under sec. 2254(d)(1), citing the Fourth Circuit's interpretation of that statute in Green v. French, 143 F.3d 865, 870 (4th Cir. 1998), cert. denied, 119 S. Ct. 844 (1999). The Fourth Circuit failed to note this Court's grant of certiorari in Williams v. Taylor, 119 S. Ct. 1353 (1999), to review the Fourth Circuit's interpretation and application of 28 U.S.C. sec. 2254(d)(1).

[11] Petitioner was convicted of three capital counts based on two murders. If the jurors rejected Cruse's testimony, Williams could be convicted of the capital murder of Mr. Keller only if the jurors concluded Williams' one shot resulted in a fatal wound.

The Fourth Circuit's harmless error analysis also ignored this Court's discussion of harmless error in a series of cases. A reviewing court must determine whether the error contributed to the conviction on the charge at issue and to what extent. See Chapman v. California, 386 U.S. 18, 24 (1967); Yates v. Evatt, 500 U.S. 391, 402-04 (1991); Arizona v. Fulminante, 499 U.S. 279, 296 (1991); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

The error alleged by petitioner goes to his convictions for capital murder. Thus, the evidence that petitioner was the triggerman responsible for the murders of both Mr. and Mrs. Keller must be independently assessed apart from any evidence supporting his convictions on other, noncapital charges and apart from his inculpatory testimony. Both petitioner and Cruse admitted committing other offenses, and each admitted firing one shot. However, the only evidence that petitioner shot and killed both Mr. and Mrs. Keller was provided by Cruse. Against this evidence, the court must weigh the subjective effect of the error on the jury's verdict. By urging the jury to find Cruse the more credible witness because petitioner had exercised his right of confrontation, the prosecutor improperly tipped the scales against petitioner.

Where credibility was the only issue for the jury, the prosecutor's error had a substantial and injurious effect or influence in determining the jury's verdict on the capital counts. Brecht, 507 U.S. at 637. Moreover, even where a court has "grave doubt" about the harmlessness of an error, the issue must be

resolved in petitioner's favor. See O'Neal v. McAninch, 513 U.S. 432, 437 (1995); California v. Roy, 117 S. Ct. 337 (1996), reh'g. denied, 117 S. Ct. 719 (1997). Under either analysis, the error in petitioner's case was not harmless.

D. The Fourth Circuit affirmed the district court's alternative holding that under pre-AEDPA law, the rule petitioner advocated would violate Teague. A 7. This decision merits further review. This Court has repeatedly held that a prosecutor may not comment on the defendant's exercise of a constitutional right. See, e.g., United States v. Hasting, 461 U.S. 499, 505-507 (1983) (failure of defendant to offer evidence); Anderson v. Nelson, 390 U.S. 523, 525 (1968) (per curiam)(comment on refusal to testify); Griffin v. California, supra (same); Johnson v. United States, 318 U.S. 189, 196-97 (1943) (comment on invocation of privilege against self-incrimination).

Petitioner's trial was conducted in 1994, well after the decisions cited herein. His conviction became final on June 26, 1995. Williams v. Virginia, 515 U.S. 1161 (1995). The rule petitioner advocates does not "break new ground" or "impose[] a new obligation on the States" and was, in fact, dictated by precedent at the time his conviction became final. See O'Dell v. Netherland, 117 S. Ct. 1969, 1973 (1997). In light of this Court's precedents, the state court was "objectively unreasonable" when it denied petitioner relief. Ibid.

E. The decision below has important and disturbing implications. If allowed to stand, the decision will permit prosecutors to

penalize a defendant's exercise of his right of confrontation in every case in which a criminal defendant testifies[12]. The threat of such improper cross-examination will also deter other defendants from taking the stand. For all these reasons, this Court should review the decision below. At a minimum, this Court should grant a stay of execution and hold a decision on this petition in abeyance pending this Court's decision in Portuondo v. Agard.

II. THE FOURTH CIRCUIT'S INTERPRETATION OF 28 U.S.C SEC. 2254(E)(2) PRESENTS AN ISSUE OF CRITICAL IMPORTANCE, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, AND IS CONTRARY TO THIS COURT'S PRECEDENTS.

This case presents an issue of critical importance: whether Section 2254(e)(2), which severely restricts federal habeas evidentiary hearings, applies to claims never raised in state court when the state suppressed the relevant facts, denied petitioner all discovery, and denied petitioner all investigative and expert assistance to discover and develop claims in state proceedings.

A. Prior to the passage of the Anti-terrorism and Effective Death Penalty Act (AEDPA), Pub.L. 104-132, 110 Stat. 1214 (1996), the standards governing the decisions of district courts to grant evidentiary hearings in habeas corpus cases were set forth in two decisions of this Court: Townsend v. Sain, 373 U.S. 293 (1963)

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[12] The Second Circuit in Agard, 117 F.3d at 712 n. 15, recognized this danger:

> It is certainly true that defendants are present in courtrooms every day. We hope it is not true that prosecutors in courtrooms all across the country are every day commenting upon a criminal defendant's presence at his own trial as though that presence were a license to lie. We intend to ensure that there is never a day on which they are free to comment within our jurisdiction.

and, subsequently, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). In Tamayo-Reyes, this Court left Townsend intact with but one exception. The Court held that a petitioner is not entitled to an evidentiary hearing where he has negligently failed to develop a material fact in state court proceedings. Tamayo-Reyes, 504 U.S. at 5. The Court thereby eliminated one of the five Townsend circumstances under which a petitioner is entitled to an evidentiary hearing as a matter of right. See, 504 U.S. at 18 (O'Connor, J., dissenting). The Court adopted one "narrow exception." A hearing would be mandated if the petitioner could show that a fundamental miscarriage of justice would result from the failure to hold a federal evidentiary hearing. Id. at 12.

Tamayo-Reyes, however, was subsumed by Section 104 of the AEDPA, codified as 28 U.S.C. sec. 2254(e)(2). See, e.g., Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir.), cert. denied, 118 S. Ct. 462 (1997); Weeks v. Bowersox, 119 F.3d 1342, 1354 n. 12 (8th Cir. 1997)(sec. 2254(e)(2) "superseded" Tamayo-Reyes); Lawrie v. Snyder, 9 F. Supp.2d 428, 438 & n. 5 (D. Del. 1998)(same); Liebman, J. and Hertz, R., Federal Habeas Corpus Practice and Procedure, sec. 20.2b, pp. 741-42 (3d ed.) ("AEDPA thus supersedes Tamayo-Reyes and the portion of Townsend v. Sain that Tamayo-Reyes itself has superseded [.]"). The relevant subsection, 2254(e)(2), restricted the availability of evidentiary hearings by eliminating the discretion this Court had left intact in Tamayo-Reyes. It also modified the rule of Tamayo-Reyes by creating a more difficult standard for overcoming default when it has occurred. Compare, 28

U.S.C. sec. 2254(e)(2)(A) and (B) with Tamayo-Reyes, 504 U.S. at 11-12.

Title 28 U.S.C. sec. 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State Court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -
>
> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The first portion of the statute ("If the applicant has failed to develop . . .") sets out the conditions precedent for its application. Only if the conditions precedent are satisfied must a petitioner meet the highly restrictive conditions set forth in (A), new law or new facts, and (B), actual innocence, to obtain a federal evidentiary hearing.

B. Petitioner argued below that the restrictive provisions of sec. 2254(e)(2) were applicable to petitioner's claims only if petitioner had been provided an opportunity to develop the factual bases of his claims in state court and had negligently failed to do so. Petitioner maintained that because he had demonstrated cause for his failure to present specific claims in state court and prejudice, sec. 2254(e)(2) was inapplicable to those claims, and the federal habeas court was not barred from holding an evidentiary

hearing.

The Fourth Circuit rejected this argument and applied sec. 2254(e)(2) on appeal to three claims petitioner had never presented in state court: two Sixth Amendment claims arising from juror and prosecutorial misconduct during voir dire and a third Sixth Amendment claim arising from the prosecutor's failure to disclose Cruse's psychiatric report. In its emergency Order staying the evidentiary hearing and remanding with instructions, the Fourth Circuit also directed the district court to apply sec. 2254(e)(2) to a claim petitioner had raised in state court, i.e., the state's failure to reveal a sentence agreement with Cruse in violation of the Sixth Amendment[13].

The Fourth Circuit's application of sec. 2254(e)(2) to petitioner's claims conflicts with the decisions of other Circuit Courts of Appeals interpreting that statute. Every Circuit Court of Appeals to interpret this section, including the Fourth, has concluded that section 2254(e)(2) does not apply "where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court. . ." Cardwell v. Greene, 152 F.3d 331, 337 (4th Cir. 1998), cert. denied, 119 S. Ct. 587 (1998). See also

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[13] On appeal, the Fourth Circuit implicitly admitted this was error, failed to correct the error, and then erroneously dismissed the claim under sec. 2254(d)(1). That section was inapplicable because the state's interference prevented development of the facts. There was no discovery, no hearing, and the state improperly hid the primary witness, Cruse, from petitioner's counsel. See United States v. Walton, 602 F.2d 1176, 1179 (4th Cir. 1979).

Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998) (where a petitioner has diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so, sec. 2254(e)(2) does not apply); McDonald v. Johnson, 139 F.3d 1056, 1059 (5th Cir. 1998) (a petitioner cannot be said to have 'failed to develop' a factual basis for his claim unless the undeveloped record is a result of his own decision or omission); Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir.) ("To be attributable to a 'failure' under federal law, the deficiency in the record must reflect something the petitioner did or omitted"), cert. denied, 118 S. Ct. 462 (1997); Jones v. Wood, 114 F.3d 1002, 1013-14 (9th Cir. 1997) (petitioner did not 'fail to develop' where the state court denied a hearing); Love v. Morton, 112 F.3d 131, 136 (3rd Cir. 1997) (petitioner did not fail to develop basis of claim where trial court's actions precluded development of record); Hunter v. Vasquez, 1996 WL 612484 (N.D. Cal. 10/03/96) at *5-*6.

To determine whether section 2254(e)(2) governs a claim, the court must examine the reasons why the claim was not presented in state court. As the Seventh Circuit explained in Burris:

> [T]he word 'fail' [in sec. 2254(e)(2)] cannot bear a strict-liability reading, under which a federal court would disregard the reason for the shortcomings of the record. If it did, then a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts. Nothing in sec. 2254(e) or the rest of the AEDPA implies that states may manipulate things in this manner.

116 F.3d at 259 (citing, Love, 112 F.3d 131 (3rd Cir. 1997)) (other citations omitted). See also, Cardwell, 152 F.3d at 338; Hunter v. Vasquez, supra at *5-*6 (petitioner did not fail to develop facts

where state denied discovery, investigation funds, and a hearing). Hence, where a petitioner has not "failed," the condition precedent for the statute's application has not been met, and section 2254(e)(2) does not govern the claim.

This interpretation of sec. 2254(e)(2) harmonizes with this Court's well-developed doctrine of "cause and prejudice" to overcome procedural default in state court. See Wainwright v. Sykes, 433 U.S. 72 (1977); Murray v. Carrier, 477 U.S. 478 (1986); Amadeo v. Zant, 486 U.S. 214 (1988); Coleman v. Thompson, 501 U.S. 722 (1991); Dobbs v. Zant, 506 U.S. 357 (1993). Section 2254(e)(2) is simply inapplicable where the petitioner has not "failed," i.e., where the petitioner can demonstrate cause and prejudice to excuse default. See Tamayo-Reyes, 504 U.S. at 11 (petitioner entitled to a hearing if he can show cause and actual prejudice). The miscarriage of justice exception set forth in Tamayo-Reyes and codified in sec. 2254(e)(2)(B), i.e., "clear and convincing evidence" of innocence, comes into play only when the petitioner has been given a full and fair opportunity in state court and has been negligent and failed to develop his claims.

B. Consistent with this Court's precedents, the district court initially found that petitioner had demonstrated both cause and prejudice on his Sixth Amendment claims arising from the voir dire. The juror, under oath, failed to reveal the relevant facts and the prosecutor, who knew the facts, failed to disclose them. The court found there was "no evidence that [petitioner's] defense or state habeas counsel knew or could have known" the facts without

disclosure by the juror or the prosecutor. A 52.

The district court found that the juror's failure to provide complete and truthful answers on voir dire demonstrated her bias and established prejudice to petitioner, citing United States v. Bynum, 634 F.2d 768, 771 (4th Cir. 1980)[14]. Hence, petitioner was entitled to a hearing. See McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984); Smith v. Phillips, 455 U.S. 209, 221-222 (1982).

In response to the Fourth Circuit's remand Order, the district court found that the conditions precedent for application of 2254(e)(2) had not been satisfied:

> [I]t is clear that [petitioner] did not "fail[] to develop" the factual basis of his claims. The record is replete with examples of state habeas counsel's numerous attempts to obtain the evidence required to discover, present and prove [petitioner's] claims--including informal attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied [petitioner] the opportunity to develop the necessary facts by denying all of [petitioner's] requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record.

A 16. However, given the Fourth Circuit's directive, the district

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[14] See also, Dyer v. Calderon, 151 F.3d 970, 982 (9th Cir. 1998)(in banc) ("The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent."); United States v. Scott, 854 F.2d 697, 698 (5th Cir. 1988) (juror failed to reveal brother was deputy sheriff and his office had part in the investigation); Burton v. Johnson, 948 F.2d 1150, 1159 (10th Cir. 1991), cert. denied, 507 U.S. 1043 (1993) (bias demonstrated where juror failed to reveal abusive family situation where defendant was on trial for killing abusive husband); United States v. Perkins, 748 F.2d 1519, 1531-33 (11th Cir. 1984) (refusal to disclose, inter alia, that juror knew defendant gives rise to presumption of actual bias); McCoy v. Goldston, 652 F. 654, 658 (6th Cir. 1981) (district court shall presume bias where juror deliberately conceals information).

court reluctantly applied 2254(e)(2), denied a hearing, and dismissed all remaining claims. A 19.

On appeal, the Fourth Circuit rejected petitioner's renewed argument that sec. 2254(e)(2) did not apply to his request for a hearing. "To escape the requirements of section 2254(e)(2), a petitioner must "diligently . . . develop the factual basis of" his claim in state court." A 4. The Fourth Circuit ignored the district court's factual findings concerning petitioner's efforts to develop his claims in state court. The Fourth Circuit then assessed petitioner's jury misconduct claims under sec. 2254(e)(2)(A)(ii) and found that he had not exercised due diligence in state court[15].

The Fourth Circuit also held that petitioner could not demonstrate cause and prejudice to excuse default under "pre-AEDPA law." A 5. This Court's recent decision in Strickler v. Greene, 119 S. Ct. 1936 (1999), was not cited and dictates a different result. In Strickler, the petitioner demonstrated cause to excuse

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[15] Ignoring the fact that federal counsel discovered the juror claims only after privately retaining an investigator (the very assistance denied in state court), the panel illogically concluded that state habeas counsel could have discovered the relevant evidence because federal counsel had done so. A 4. The Fourth Circuit then imposed the standard for presentation of a constitutional claim to a state court on a petitioner's request for state investigative assistance. The Court cited no Supreme Court or circuit court precedent supporting this novel requirement and for obvious reasons. If habeas counsel had known of the juror claims, he would not have required an investigator but would have included the claims in the state petition. An investigator was required to discover unknown facts supporting potential claims. See McFarland v. Scott, 512 U.S. 849, 855 (1994). Habeas pleading by its very nature concerns facts outside the record.

default based on the state's representations at both trial and state habeas that all Brady materials had been disclosed. This Court held that where trial counsel had reasonably relied on the state's representations, it was equally reasonable for state habeas counsel to rely on those same representations. Citing Murray v. Carrier, 477 U.S. 478, 491 (1986), this Court emphasized that the standard for cause does not vary depending on the timing of a procedural default. Id. at 1949. When finding cause for default, the Court held that state habeas counsel had no obligation to plead a claim without evidentiary support. Habeas counsel need not assume that a prosecutor has acted improperly. Id. at 1950.

Petitioner presents the very same situation. The juror answered under oath, and trial counsel had no reason to doubt her veracity. The prosecutor knew at trial that the juror had not answered truthfully, but the prosecutor failed to reveal the relevant facts. The state has never argued that petitioner defaulted the juror and prosecutorial misconduct claims at the trial level, but has implicitly conceded that trial counsel were entitled to rely on the juror's voir dire responses and to assume that the prosecutor would properly fulfill his official duties. As Strickler held, if it was reasonable for trial counsel to rely on representations made during trial, it was equally reasonable for state habeas counsel to rely on those same representations. As in Strickler, the state never disclosed the relevant facts in state habeas but instead actively impeded petitioner's efforts by arguing that an investigation of juror misconduct would be "frivolous" and

an improper intrusion on the jurors. JA 395. Thus, the state's actions successfully blocked petitioner's discovery of the relevant facts in state court. Under the principles set forth in Strickler, Amadeo v. Zant, 486 U.S. 214, 222 (1988), and Murray v. Carrier, 477 U.S. 478, 488 (1986), petitioner demonstrated that an objective factor external to the defense impeded his counsel's efforts to comply with the state's procedural rules. See also Coleman v. Thompson, 501 U.S. 722, 753 (1991)(external impediment must make compliance "impracticable" and basis of claim not "reasonably available.")

Petitioner was not negligent under either the AEDPA or pre-AEDPA law. He was prejudiced as the seating of a biased juror creates a structural defect in the trial. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991); Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986); Tumey v. Ohio, 273 U.S. 510, 535 (1927).

C. The Fourth Circuit applied sec. 2254(e)(2) to petitioner's Brady claim arising from Cruse's psychiatric report. The Fourth Circuit held that federal counsel's discovery of the report demonstrated that state habeas counsel had not exercised diligence as required by sec. 2254(e)(2)(A)(ii), and petitioner could not demonstrate innocence under 2254(e)(2)(B). A 5.

Again, section 2254(e)(2) was inapplicable. Both trial counsel and state habeas counsel tried to develop this claim. They requested disclosure of all Brady material. State habeas counsel specifically requested all psychiatric reports of any witness that

could effect the witness' credibility. JA 379. Irrespective of any request, the state had a duty to disclose the report. See, e.g., Strickler, supra; Kyles v. Whitley, 514 U.S. 419 (1995). State habeas counsel personally examined Cruse's trial file and did not find the report therein. JA 1502. His discovery motions were denied by the court, all informal discovery efforts were rebuffed, and all motions for investigative assistance were denied.

As the district court recognized, petitioner was prejudiced. JA 1302-03. His conviction on at least two capital counts depended entirely on Cruse's testimony and the jury's assessment of Cruse's credibility. Had Cruse been properly impeached, petitioner's own testimony may well have been unnecessary. Suppression of the report was prejudicial under any Brady analysis.

D. The Fourth Circuit erred when it failed to remand for an evidentiary hearing on the Brady claim alleging the state's failure to reveal a sentence agreement with Cruse in violation of the Sixth Amendment. The Fourth Circuit failed to correct its erroneous Order directing the district court to apply sec. 2254(e)(2) to this claim after the district court had granted an evidentiary hearing. Petitioner alleged numerous facts demonstrating that an undisclosed sentence agreement existed (A 75-76). He raised the claim in state court, was denied discovery and a hearing, and had not "failed" to develop his claim. The state denied development of the facts. See Cardwell v. Greene, 152 F.3d at 337. Petitioner was prejudiced as the district court found. A 77.

E. When possible, a state should be given the first opportunity

to correct its own errors. However, the state zealously opposed all efforts by petitioner's counsel to discover and develop claims and to obtain essential expert resources. While a state may elect to deny all resources, discovery, and/or a hearing in state habeas, it cannot then argue that the indigent petitioner, who requested the necessary resources for claim discovery and development, is responsible for the failure to develop the state court record and is barred from a federal evidentiary hearing. See Correll v. Stewart, 137 F.3d 1404, 1414 (9th Cir. 1998); Burris, 116 F.3d at 359.

This issue merits this Court's review. Section 2254(e)(2) presents a procedural bar to federal evidentiary hearings. Its interpretation and application by the lower courts will have immeasurable impact on habeas petitioners in every jurisdiction.

III. THE FOURTH CIRCUIT'S INTERPRETATION OF REVISED 21 U.S.C. SEC. 848(Q)(9), GOVERNING THE PROVISION OF EXPERT ASSISTANCE FOR INDIGENT DEFENDANTS, IS INCONSISTENT WITH THE TEXT AND INTENT OF THE STATUTE AND McFARLAND v. SCOTT, 512 U.S. 849 (1994).

The third issue in this case deals with the provision of investigative and expert services for capital defendants and habeas petitioners under revised 21 U.S.C. sec. 848(q)(9). The Fourth Circuit has interpreted the statute to require an adversarial hearing--a requirement absent from the statute--before a defendant can request these essential services ex parte. This construction and interpretation of the statute merits this Court's review given its importance to the proper functioning of the criminal justice system and the representation of indigent defendants.

In every federal criminal action in which an indigent

defendant is charged with a capital crime, and in every habeas corpus action under 28 U.S.C. sec. 2254 or 2255, in which an indigent defendant has been sentenced to death, federal law authorizes investigative, expert, or other services to assist the defendant under 21 U.S.C. sec. 848(q)(9), if those services are reasonably necessary. Indigent defendants charged with noncapital federal crimes are also entitled to investigative, expert, and other services necessary for an adequate defense under the Criminal Justice Act, 18 U.S.C. sec. 3006A(e).

This Court recognized the importance of expert assistance when preparing a capital habeas petition in McFarland v. Scott, 512 U.S. 849, 855 (1994):

> The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified.

(Emphasis added); see also Ake v. Oklahoma, 470 U.S. 68, 82-83 (1985)(threshold showing sufficient to invoke constitutional right to expert assistance at trial may be made ex parte).

Prior to petitioner's appeal, the Fourth Circuit had acknowledged the critical function served by ex parte procedures when requesting expert and investigative assistance for indigents:

> The ex parte procedures in sec. 848(q). . . simply level the playing field between petitioners able to purchase (and thereby not disclose to the opposing side) the usual litigation services--experts, investigators, subpoena-servers--and those forced to request payment of these services from the court. [Citations omitted.]

In Re: Pruett, 133 F.3d 275, 279 (4th Cir. 1997); see also Lawson v. Dixon, 3 F.3d 743, 751 (4th Cir. 1993).

Consistent with the goal of providing resources to indigent defendants, prior to April 24, 1996, sec. 848(q)(9) provided in pertinent part:

> Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant . . . the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore under paragraph (10).

However, in April 1996 the AEDPA amended 21 U.S.C. sec. 848(q)(9) so that it now reads in pertinent part:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant . . . the court may authorize the defendant's attorneys to obtain such services . . .[and] shall order the payment of fees and expenses . . . No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

Significantly, the AEDPA did not limit the changes in sec. 848(q)(9) to requests for services by habeas petitioners. The changes apply equally to pretrial federal motions. Equally significant, the AEDPA did not amend 18 U.S.C. sec. 3006A(e) with respect to the right to seek services ex parte, or with respect to the court's obligation (rather than its discretion) to authorize those services upon a showing of necessity in federal criminal cases. Recognizing the strong link between these two statutes, the AEDPA itself provided, in amended 28 U.S.C. sec. 2254(h), that critical aspects of federal habeas proceedings under Section 2254 "shall be governed by section 3006A of title 18."

Petitioner had filed sealed motions for specific expert

assistance[16] and for permission to proceed ex parte. Petitioner had provided the court with a detailed memorandum setting forth the experts requested, the preserved claims in his state habeas petition related to the requested federal assistance, and his unsuccessful efforts to obtain this same assistance in state court. JA 579-596.

The district court interpreted amended 848(q)(9) to require petitioner to submit to adversarial proceedings to show the need for confidentiality -- even if the applicant asserts that he must disclose confidential information in order to make the required showing -- and to require an applicant to reveal his proposed federal claims and proposed investigation to his adversary prior to filing his petition before the Court would entertain his motions.

On appeal, the Fourth Circuit affirmed (A 7):

> In limiting ex parte requests for expert assistance, Congress was clearly addressing the routine approval of such requests even in those instances where expert or investigative services were unnecessary. . . . Allowing an ex parte hearing to determine the need for an ex parte hearing not only seems convoluted, but it also runs afoul of the plain language of the statute.

The Fourth Circuit's interpretation of sec. 848(q)(9) merits this Court's review. The amended statute does not mention or require an adversarial hearing. Such a construction of the statute requires a petitioner to reveal the very information he seeks to protect. Petitioner maintained below that the plain and proper

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[16] The district court initially granted these motions and petitioner was in the process of retaining experts when the Order was stayed. A 122. Thus, the district court had already concluded that petitioner had demonstrated that the services were necessary.

reading of the statute avoids this contradiction: if the need for confidentiality is demonstrated, then an ex parte request may be considered and a record must be made for later review[17]. The revised statute simply removes the requirement that all applications for services and assistance be made ex parte. A determination that confidentiality is required has been left to the discretion of the court to be determined on a case by case basis. Moreover, section 848(q)(9) clearly permits ex parte requests when a "proper showing is made concerning the need for confidentiality." See Shields v.Johnson, 48 F. Supp.2d 719 (S.D. Tex. 1999).

Furthermore, any construction of sec. 848(q)(9) that requires an indigent defendant to divulge confidential information to his adversary in order to obtain services runs afoul of the Constitution. Under a long line of Supreme Court cases, meaningful access to the courts cannot be restricted to persons of means. See Gardner v. California, 393 U.S. 367, 370-71 (1969)(stenographic

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[17] See, 1 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice & Procedure, sec. 19.3 at 695 (3d ed. 1998), citing Miller-El v. Johnson, Civ. No. 3:96 CV1992-H (N.D. Tex. June 18, 1997)(court denied State's request to strike petitioner's ex parte sealed motions for investigative funds and allowed petitioner to proceed ex parte; "[a]llowing the Respondent access to the confidential information contained in Petitioner's request to proceed ex parte directly conflicts with Congress' intent to authorize ex parte proceedings upon a proper showing"); Hawkins v. Calderon, CIV S-96-1155 LKK/PAN (E.D. Cal. May 6, 1997)(magistrate judge erred in permitting state to participate in proceedings to determine whether petitioner's funding request should be placed under seal and in requiring petitioner to serve state with copy of brief on need for confidentiality). Accord Calderon v. United States Dist. Ct., 107 F.3d 756, 761 & n.11 (9th Cir.), cert. denied, 118 S. Ct. 265 (1997) (state has no standing to appeal district court's treatment of request for investigative and expert funds).

transcript of evidentiary hearing in habeas must be provided to indigent habeas petitioner to enable him to prepare habeas petition to higher court); Bounds v. Smith, 430 U.S. 817, 821 (1977)(describing fundamental right of meaningful access to courts for habeas petitioners); Ex Parte Hull, 312 U.S. 546, 549 (1941)("[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus").

The right of meaningful court access is guaranteed in both criminal and civil actions. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971)(holding that filing fee for divorce actions violates due process if not waived for indigents). And this right indisputably applies to habeas proceedings. See Smith v. Bennett, 365 U.S. 708, 712 (1961)(regardless whether labeled as criminal appeal or habeas petition, procedures used by indigent prisoners to regain liberty lost through criminal process are safeguarded by constitutional right to equal protection).

Section 848(q)(9) governs the provision of expert services for all indigent, capital defendants and habeas petitioners in the federal courts. Review should be granted to address the proper interpretation and application of that statute.

CONCLUSION

The petition for writ of certiorari should be granted.

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CERTIFICATION OF SERVICE

I hereby certify that one copy of each of the following:

Motion For Leave To Proceed In Forma Pauperis

Application For A Stay Of Execution

Petition For Writ of Certiorari

Appendix to Petition For Writ of Certiorari

was served by Federal Express delivery service on counsel for the Respondent, Donald Curry, Senior Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219 on October 16, 1999.

Barbara L. Hartung

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